No. 170.

Supreme Court of the United States.

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Clerk.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - Plaintiff in Error,

vs.

BARBER ASPHALT PAVING COMPANY AND THE CITY OF LOUISVILLE, - Defendants in Error.

Brief for Plaintiff in Error on Motion to Dismiss or Affirm.

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For Plaintiff in Error.

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Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - *Plaintiff in Error,*

vs.

BARBER ASPHALT PAVING COMPANY AND THE CITY OF LOUISVILLE, - *Defendants in Error.*

Brief for Plaintiff in Error on Motion to Dismiss or Affirm.

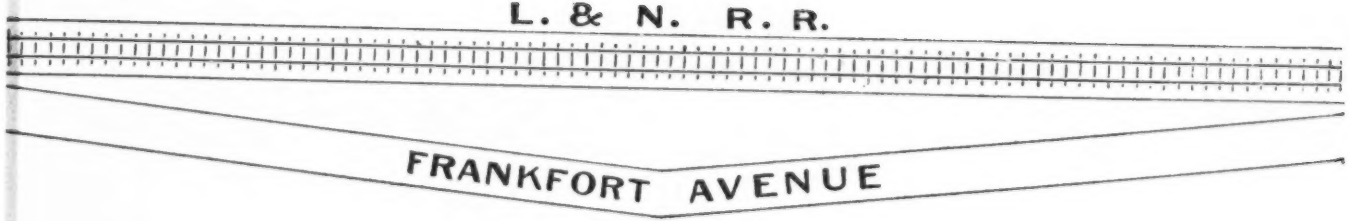
The railroad of the Louisville & Nashville Railroad Company through the extreme eastern portion of the city of Louisville lies, for a long distance, side by side with a street called Frankfort Avenue. This was formerly an old turnpike leading from the city of Louisville to Shelbyville and Frankfort and other points east. On account of the growth of the city its boundaries were extended, thus taking in a large amount of land from Jefferson County, and bringing within the limits a long section of the old turnpike. This was then improved as a city street by laying upon it an expensive asphalt pavement. The entire cost of this improvement was apportioned upon the immediately adjacent property on the local assessment plan. This suit embraces one section of the improvement thus made, this section being about one-third of a mile in length. The railroad, as said

above, lies practically side by side with the highway in question. At the extreme east and west ends of the section involved in this suit the railroad and the highway are adjacent to each other; but between the two ends the highway deflects somewhat to the southward, so that, near the halfway point, it is about 100 feet from the line of the railroad. In other words, the situation is as shown on the accompanying diagram, it being remembered that the railroad is a double track railroad.

The city of Louisville assessed upon the section of the railroad right of way here involved the sum of $3,472.94 as its part of the cost of making this improvement of the street. The railroad company declined to pay it, for the reasons stated in its answer, which we shall presently quote. The contractor, to wit, the Barber Asphalt Paving Company, to which had been issued the city's warrant against the right of way, brought suit in the Jefferson Circuit Court, asserting a lien upon the right of way for $3,472.94, with interest, and asked for a sale to satisfy the same. The defendant answered, and as that answer is not unduly long, and states the facts upon which the decision of the case rests, we here quote it in full:

"Defendant, the Louisville & Nashville Railroad Com-
"pany, denies that it is, or at the institution of this action
"was, the owner of a lot of land described in the petition
"as belonging to it, or to any part thereof, except in
"the manner and to the extent hereinafter set forth.

"Par. 2. Said defendant says it is a corporation
"created for the purpose of owning and operating a rail-
"road under and by an act of the General Assembly of
"Kentucky, entitled 'An Act to charter the Louisville &
"Nashville Railroad Company,' approved March 5, 1850,
"and various acts amendatory thereof.


L. & N. R. R.
FRANKFORT AVENUE

"It says it does now own and for many years has owned "a line of railroad extending from Newport, Ky., to and "through Louisville, Ky., and thence southwardly through "Kentucky and other States.

"It owns, and has long owned, a perpetual right of way "for railroad purposes from Newport to and into Louis- "ville, over a long strip of land, which is about 110 miles "long and about 66 feet wide, on which is constructed its "roadbed, and over which are operated its trains between "and into the cities aforesaid. Occasionally, for short "distances, the width of the right of way as above given "varies, but that given above is the usual width, and is "its greatest width at the place referred to in the petition "herein. The said right of way passes over the parcel of "land described in the petition herein as belonging to this "defendant; in other words, it constitutes a section of "said indivisible and continuous right of way between the "cities aforesaid; and the only interest of defendant in "said land is an easement therein, to wit, the perpetual "right of itself, its successors and assigns, to the use of "the same for railroad purposes, as aforesaid; and should "such use be abandoned, all interest of this defendant, its "successors and assigns, in said land would cease. Over "said parcel of land, which, as aforesaid, is, at its greatest "width, only 66 feet wide, is constructed a section of "defendant's roadbed between its terminal properties in the "cities aforesaid, and on the same are laid two tracks, par- "allel with the northerly and southerly lines of said par- "cel of land described in the petition, constituting what "is called a double track, and being parts of defendant's "two main tracks between the cities aforesaid, over which "are operated its trains between said cities. *On said par-* "*cel of land there are no houses or buildings, but it is used*

"*only, and is available for use only, as an indivisible part* "*of defendant's right of way aforesaid, on which is located* "*a section of its roadbed as aforesaid, and over which its* "*trains pass between its terminal properties in the two* "*cities aforesaid.*

"Said parcel of land over which said right of way "exists, as aforesaid, runs practically parallel with the sec- "tion of the street described in the petition herein as hav- "ing been improved. The south line of said parcel of land, "over which the said right of way exists, and the north "line of the said street are very close together, possibly in "contact with each other, at the extreme eastern and "western ends thereof, and, while the south line of the said "right of way is a straight line, the north line of the "street is a curved line, the concave side thereof being "toward the line of said right of way; the greatest "distance between said two lines being about 105 feet, "which is at a point about halfway between the eastern "and western ends of the property and street described in "the petition.

"*Defendant says neither said parcel of land described* "*in the petition, nor any right or interest of defendant* "*therein, is, or has been, or will be, or can be, benefited to the* "*slightest degree by the improvement of Frankfort Avenue* "*as set forth in the petition herein. On the contrary, the* "*existence of said avenue and the improvement thereof,* "*which will lead probably to an increase in the use thereof,* "*being very close to the said right of way of defendant,* "*is a positive injury to defendant and its said right of* "*way, rather than a benefit.* Said right of way could be "more safely and advantageously used by defendant for "the only purpose for which it does or can ever use it, if "said Frankfort Avenue were entirely removed from

"within the territory described in plaintiff's petition as a "tax district, than it can with said avenue in said district.

"Defendant says that to subject said parcel of land "described in the petition, or defendant's interest therein, "under the ordinance referred to in the petition, to the "payment of any part of the cost of the improvement of "Frankfort Avenue, or to compel this defendant in any "way to pay any part of the cost of improving said "Frankfort Avenue, otherwise than by means of a general "tax laid equally and uniformly upon all taxable property "in the city of Louisville, *will be to deprive this defendant "of its property without due process of law, and would "deny to it the equal protection of the laws, contrary to "the provisions of the Fourteenth Amendment to the "Constitution of the United States.*

"Wherefore, defendant prays that plaintiff's petition "be dismissed." (Rec., 16.)

In other words, the defendant in effect pleaded, as a matter of fact, that the exaction here sought to be made from it for the cost of this public improvement was "in substantial excess of the special benefits accruing to it"; that the cost assessed against it was $3,472.94, whereas there was no special benefit whatever accruing to its property sought to be charged, and that this was, therefore, "a taking, under the guise of taxation, of private property for public use without compensation."

To this answer the plaintiff demurred; that demurrer was sustained; and after making a correction in the assessment, whereby it was reduced by the sum of $296.22, the court entered a judgment giving plaintiff a lien upon this section of the right of way for sums aggregating $3,176.72, and ordered a sale to satisfy the same. (Rec., 50.) From that

judgment an appeal was taken to the Court of Appeals of Kentucky, where it was affirmed; and the case was then brought to this court by writ of error. Defendants in error have now moved to dismiss or affirm.

MOTION TO DISMISS.

We are not advised of the ground upon which the motion to dismiss is made. Not a word is said about it in the brief filed by defendants in error. The answer makes the federal question as plain as the English language can make it; and the motion to dismiss was evidently made merely in order to afford an opportunity for making a motion to affirm; which seems to us to be a manifest abuse of the rule of this court governing such cases.

MOTION TO AFFIRM.

Subsection 5 of Rule 6 of this court says:

> "There may be united with a motion to dismiss a writ "of error or an appeal, a motion to affirm on the ground "that, although the record may show that this court has "jurisdiction, it is manifest the writ or appeal was *taken* "*for delay only*, or that the question on which the juris- "diction depends is *so frivolous as not to need further* "*argument*."

There is certainly nothing in this record to show that this writ was taken for delay only, and we do not see how it can be said under the state of the decisions to which we shall refer, that the federal question involved is "so frivolous as not to need further argument."

I.

Of course, we are familiar with the opinions of this court, first in Norwood vs. Baker, 172 U. S. 269, and then in French vs. Barber Asphalt Paving Company, 181 U. S. 324, and other cases decided on the same day.

The court in the latter cases did not overrule Norwood vs. Baker, nor retract the fundamental principle therein asserted. We do not rely alone upon our own interpretation of the opinions in question. In the case of White vs. City of Tacoma, 109 Fed. Rep. 32, the court said:

> "In a series of decisions recently rendered the Supreme "Court of the United States has corrected a common "understanding of the decision of that court in the case "of Village of Norwood vs. Baker, 172 U. S. 269. (Citing "the cases referred to.) In these several decisions the "Supreme Court recognizes the fact that the per front "foot plan *may be* a perfectly fair method of apportioning "the burden of paying for street improvements, and that "in cases in which it appears that assessments levied "according to that plan are not in excess of the benefits "to the property assessed, and are equal and fair, *so that "there is no ground for complaining of actual injustice*, "the assessments are not *necessarily* in violation of the "Constitution of the United States *merely because made "according to the per front foot plan;* and it is shown "that no such inflexible rule was announced or intended "by the court in its decision in the case of Village of "Norwood vs. Baker. That decision, however, does "emphatically declare these important principles: That "State laws providing for assessing the cost of street "improvements upon abutting property, which *in prac-*

"*tical operation do confiscate property*, are obnoxious to "the Fourteenth Amendment to the Constitution of the "United States, and for that reason it is the duty of the "courts to declare them to be void. That special assess- "ments to pay for local improvements of public streets "and highways *do, in practical effect, deprive owners of* "*their property without due process of law, unless the* "*property subject to assessments is benefited by the* "*improvements correspondingly to the amount of the assess-* "*ment.* That owners of property have the right to appeal "to the courts for judicial protection against the uncon- "stitutional invasion of their rights by municipal govern- "ments in enforcing State laws or local regulations for "the collection of assessments *which are in excess of the* "*benefits to the property assessed*, accruing or to accrue "by reason of the improvements to be paid for by such "assessments. *These principles remain unaffected by the* "*recent decisions of the Supreme Court.*" (Pages 33 and 34.)

And speaking of this opinion, the editor of the Central Law Journal says:

"Without hesitation we pronounce this decision not "only eminently just and equitable, but also among the "foremost of the decisions of this question by reason of "its clear recognition and elucidation of right principle "and sound law." (53 Central Law Journal, 281.)

The propositions asserted by the court in White vs. City of Tacoma are exactly those which the plaintiff in error asserts in the case at bar, and upon which it relies for a reversal of the judgment under consideration. And surely it

can not be said that a position taken by one of the federal courts, even though inferior to this tribunal, and which has been so highly commended by one of the leading law journals of the country, is "so frivolous as not to need further argument."

In Norwood vs. Baker this court said:

> "In our judgment, the exaction from the owner of "private property of the cost of a public improvement *in* "*substantial excess of the special benefits* accruing to him "is, *to the extent of such excess*, a taking, under the guise "of taxation, of private property for public use without "compensation. We say 'substantial excess,' because "exact equality of taxation is not always attainable, and "for that reason the excess of cost over special benefits, "unless it be of a material character, ought not to be "regarded by a court of equity when its aid is invoked to "restrain the enforcement of a special assessment." (172 U. S. 279.)

Nowhere in any of the opinions delivered in French vs. Barber Asphalt Paving Company, and other cases decided at the same time, is this principle, so clearly announced in Norwood vs. Baker, retracted; although in the dissenting opinion, concurred in by three of the members of this court, a doubt was expressed as to what was intended by some of the language used in the majority opinion, and a fear that exactly the construction would be placed upon it which the counsel for the defendants in error in the case at bar do now place upon it. In this dissenting opinion Mr. Justice Harlan, speaking for himself and his concurring associates, after referring to the principles announced in Norwood vs. Baker in the language herein above quoted, said:

"Does the court intend in this case to overrule the "principles announced in Norwood vs. Baker? Does it "intend to reject as unsound the doctrine that 'the "principle underlying special assessments to meet the cost "of public improvements is that the property upon which "they are imposed is peculiarly benefited, and therefore "the owners do not, in fact, pay anything in excess of "what they receive by reason of such improvement'? Is "it the purpose of the court, in this case, to overrule the "doctrine that taxation of abutting property to meet the "cost of a public improvement—such taxation being for "an amount in substantial excess of the special benefits "received—'will, *to the extent of such excess*, be a taking "of private property for public use without compensation? "*The opinion of the majority is so worded that I am not "able to answer these questions with absolute confidence.* "It is difficult to tell just how far the court intends to go. "But I am quite sure, from the intimations contained in "the opinion, that it will be cited by some as resting "upon the broad ground that a legislative determination "as to the extent to which land abutting on a public "street may be specially assessed for the cost of paving "such street is conclusive upon the owner, and that he "will not be heard, in a judicial tribunal or elsewhere, to "complain, even if, under the rule prescribed, the cost is "in substantial excess of any special benefits accruing to "his property, or even if such cost equals or exceeds the "value of the property specially taxed." (181 U. S. 352-3.)

Now, in the brief of counsel for defendants in error, the case of French vs. the Barber Asphalt Paving Company is cited in support of *exactly the proposition outlined in the language just quoted.* The answer of the railroad company

pleads that its property is *not benefited at all*, but, in fact, is injured by the making of the improvement on account of which it has been assessed with a charge of $3,176.72; thus showing that the exaction for the cost of this improvement is "in substantial excess of the special benefits accruing" to the property involved. And these allegations are admitted to be true. And yet it is claimed that they are of no effect, that the legislative determination of the matter is conclusive, and that the owner "will not be heard, in a judicial tribunal or elsewhere, to complain, even if, under the rule prescribed, the cost is in substantial excess of any special benefits accruing to his property." And it is asserted that any question as to the correctness of such a position, the very question suggested by the dissenting Justices in the opinion just referred to, is "so frivolous as not to need further argument."

We do not know just how far we ought to proceed in the consideration of the merits of the case in a brief upon such a motion as is now before the court. But we recognize, of course, that the entire case of the plaintiff in error is in one sense dependent upon the court's disposition of this motion. If it should sustain it, that is, of course, the end of the case; and, while we can not see how the court, in view of the considerations already suggested, could hold the question here presented to be frivolous, yet we feel impelled to call the court's attention, in a more extended form, to some further suggestions upon the merits of the case.

We have already quoted, from the opinion in Norwood vs. Baker, the deliberate announcement by this court of the essential principle upon which the whole case rests, to wit, that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking, under the guise of taxation, of private prop-

erty for public use without compensation." And if that is the law, then, undoubtedly, the answer of plaintiff in error in the case at bar presents a defense, and the judgment in disregard of it should be reversed. The answer pleads, and it is admitted, that the cost in question is in substantial excess of the benefits received, and the Constitution of the United States is relied upon as a protection against a proceeding whereby the property is sought to be taken for the payment of this charge. And if there is any possible ground upon which relief from this assessment can be denied, consistently with the main principle asserted in Norwood vs. Baker, then it is so occult that we have not been able to perceive it.

We have read every line, not only of the many opinions delivered by the court in the several cases decided at the same time with French vs. Barber Asphalt Paving Company, but we have read the statements of facts in all of those cases, as given by the court, and we have not been able to find anywhere any retraction of the essential principle expressed in the words heretofore quoted from Norwood vs. Baker; nor have we been able to find any *condition of facts* presented in any of those cases, so far as is shown by the court's opinions, or its statements of facts, which called for a decision of the question as to whether or not an assessment, which is *in fact in substantial excess of the benefits accruing to the property*, must nevertheless be upheld. In all of those cases the attack was simply upon *the legislative act*, or municipal ordinance, under which the proceeding was had. We have not been able to find the statement, in a single one of the cases, that *as a matter of fact* the cost sought to be assessed upon the property involved was in substantial excess of the benefit accruing to it. If any such fact appeared in any record then before the court, that fact is not stated in any statement of

fact or opinion of the court then made or delivered; and surely nothing which the court decided was in view of any such consideration. In the first and leading case of the series, to wit, French vs. Barber Asphalt Paving Company, the court, after referring to Norwood vs. Baker and to the principle thereby established, and without to any extent retracting the same, says:

"It may be conceded that courts of equity are always "open to afford a remedy where there is an attempt, "under the guise of legal proceedings, to deprive a person "of his life, liberty or property without due process of law. "And such, in the opinion of a majority of the judges of "this court, was the nature and effect of the proceedings "in the case of Norwood vs. Baker.

"*But there is no such state of facts in the present case.* "Those facts are thus stated by the court of Missouri:

"'The work done consisted of paving with asphaltum "the roadway of Forest Avenue in Kansas City, thirty- "six feet in width, from Independence Avenue to Twelfth "Street, a distance of one-half a mile. Forest Avenue is "one of the oldest and best improved residence streets in "the city, and all of the lots abutting thereon, front the "street and extend back therefrom uniformly to the depth "of an ordinary city lot to an alley. The lots are all "improved and used for residence purposes, and all of "the lots are substantially on the grade of the street as "improved, and are similarly situated with respect to the "asphalt pavement. The structure of the pavement along "its entire extent is uniform in distance and quality. "There is no showing that there is any difference in the "value of any of the lots abutting on the improvement.'" (181 U. S. 345.)

This is the statement of facts upon which the case was decided, from which it is seen that there is an entire absence of any showing that the cost of the improvement was in substantial excess of the benefits accruing therefrom. Not a word is said on that subject. But the proposition upon which the property owner there resisted the assessment was, that the act and ordinance under which the assessment was made were unconstitutional, because no provision was made for a hearing upon the question of benefits. He did not insist as a matter of fact that there was no benefit, or that the cost was in excess of the benefit, but he simply said, I have had no hearing on that question, and no opportunity for a hearing, and therefore the entire procedure is void. And it was that proposition, and only that proposition, which the court denied in French vs. Barber Asphalt Paving Company, and other cases decided at the same time.

The fundamental principle announced in Norwood vs. Baker, in the language heretofore quoted, was the deliberate decision of this, the highest judicial tribunal in the land, and is the law of the land, unless it has been retracted by the court in the subsequent cases mentioned; and that this has not been done, we think we have made manifest from what we have said. And if this be true, the judgment involved in the case at bar must be reversed.

It is said in the brief for defendants in error that this court, in the case of Walston vs. Nevin, 128 U. S. 578, upheld the validity of the statutes of Kentucky governing special assessments. But an examination of the opinion in that case will immediately show that the court's attention, as in the case of French vs. Barber Asphalt Paving Company, was directed entirely to the *validity of the statute.* The question as to whether or not the enforcement of an assessment in *substantial excess of the benefit* conferred by the improvement would

be the deprivation of property without due process of law was neither considered nor decided. And the court upheld *the statute* on account of a provision in it to the effect that "the General Council, or the courts in which suits may be pending, shall make all corrections, rules and orders to do justice to all parties concerned" (Section 2834 of Kentucky Statutes, quoted in the appendix to the brief for defendants in error); under which statute the Court of Appeals of Kentucky had previously said that the powers vested in the local government were subject to the supervision of the courts "where the particular facts in each case can be examined, and the controversy determined by those rules and principles which have always governed courts in dealing with questions of assessment and taxation." This court, for the reasons suggested, held that the statute was not unconstitutional. But in the case at bar, notwithstanding the provision of the statute just mentioned, the court declined to accept as a defense the admitted fact, pleaded in the answer, that the property of defendant was only a railroad right of way, and that it was not benefited to any extent whatever, but was, rather, injured in value, by the improvement in question, thus showing that the cost sought to be imposed upon that property, to wit, $3,176.72, was in substantial excess of the benefits accruing from the improvement. The court sustained a demurrer to that answer, thus holding that these facts constituted no defense to the assessment, and entered a judgment, notwithstanding these admitted facts, enforcing a lien upon the property for the amount named. And it matters not to the defendant (plaintiff in error), nor does it make any difference in point of law, whether the fault in taking defendant's property without due process of law lies with a *legislature* or a *court;* for the probibitions of the Fourteenth Amendment to the Federal Constitution, against depriving any person of

his property without due process of law, are not leveled only against the legislative department of the State, but run against the judicial and executive departments, as well as against the legislative. (Chicago, etc., R. Co. vs. Chicago, 166 U. S. 226, 233.) Therefore, if "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation," it matters not to the owner of such property whether this result is accomplished because the statute, when *properly* construed, attempts to authorize or require it, or because the court which actually enforces the statute holds that, under the statute, the property owner can not be heard to say that the cost assessed against him is in substantial excess of the benefits accruing to him.

The court held that "the question of benefits is *determined by the legislature*, and can not be raised, as is attempted to be done in this case, by the Louisville & Nashville Railroad Company, in the second paragraph of its answer. Being a matter for the legislature to determine, the courts will not interfere except in cases of spoliation." (Rec., 28.) And the court further held that by spoliation is meant "to *entirely* take from the citizen his property," saying on this subject:

> "It follows that a lot owner may be compelled to pay "his proportion of the cost of an improvement, *although* "*in his particular case the property may not be benefited.* "This rule, however, can not be so extended as to *entirely* "take from the citizen his property. This would work a "manifest injustice. It would be spoliation, and not tax- "ation." (Rec., 29.)

In other words, the court held that, although the property of defendant might not be benefited at all by an improvement for which his property was assessed with a large sum, and although that sum might equal *one-half* or *three-fourths* of the value of defendant's property, yet this would constitute no defense to the assessment and afford no ground for relief to the owner of the property; that the court could not, and would not, act unless it could be shown that the cost of the improvement was *equal* to the value of the property, so that the proceeding could be said "to *entirely* take from the citizen his property." And, accordingly, the court held in this case that the assessment of $3,176.72 against about one-third of a mile of a right of way, which is at the rate of nearly *$10,000 a mile*, and where the improvement was of *no benefit whatever*, but rather a disadvantage to the right of way, was perfectly legitimate. In other words, says the State Court, it is clearly *constitutional* to take *half* of the citizen's property without compensation, but flagrantly *unconstitutional* to take *all of it.* But *this* court has said it is unconstitutional to take any sum in "substantial excess" of the benefits conferred.

An example of the effect which the court in the case at bar gave to the provision of the statute authorizing the court to "make all corrections, rules and orders to do justice to all parties concerned," is afforded by a correction which the court did make in the *manner of apportioning* the cost upon the various properties which the statute charges therewith. It will be seen from the provisions of the statute (quoted in the appendix to the brief of defendant in error), that where the territory contiguous to the street improvement is *divided into squares* by being bounded by principal streets, the assessment is by the statute peremptorily required to be upon each "fourth of a square" abutting upon the street improvement; thus making two quarter squares on each side of the improvement, the

effect of which, therefore, is, of course, to go back on each side halfway to the next parallel street. But when the territory contiguous to the improvement is *not defined into squares* by principal streets, then the statute requires that the ordinance providing for the improvement shall state the depth on both sides of the improvement to be assessed for the cost of making it. Thus it is apparent, and the courts of Kentucky have so held, that, where the contiguous property is defined into squares, the statute itself fixes the district to be assessed, leaving the council nothing to do in the matter; but where it is not thus defined into squares, then the council must fix the line on each side of the improvement to which the assessment shall go. Cooper vs. Nevin, 90 Ky. 85; Preston vs. Roberts, 12 Bush, 570. But, in either event, when the outer boundaries of the territory to be assessed have been fixed, whether by the statute or the ordinance, *all property within those boundaries* must be "equally" assessed according to the number of square feet in each piece of property. And in the case at bar the City Council, in providing for this improvement of Frankfort Avenue, treated the territory adjacent thereto as *not* being defined into squares, and therefore undertook to state that the assessment should be on each side of the improvement to a line 195 feet therefrom; and the petition alleged that the territory was not defined into squares. But as the amended answer of the defendant alleged that this territory was divided into squares (Rec., 32), and as the evidence so showed, the court accordingly ordered a correction of the assessment so as to conform to the requirement of the statute in such cases, in the manner of making the apportionment, by extending to a line halfway to the next parallel street; the effect of which was to reduce the assessment upon the right of way of defendant by the sum of $296.22, thus reducing it from $3,472.94 to $3,176.72.

Thus, while the court assumed to *correct the manner of apportionment* of the cost, in order to conform to the language of the statute, yet it held that it was not permissible for defendant to allege and show as a matter of fact that its property was not benefited at all, and that the cost of the improvement, which was a substantial sum, was, therefore, in substantial excess of the benefits accruing to the property of defendant.

II.

Thus far we have been considering the principle under discussion, in its application to all kinds of property. But whatever may be the true rule as to property in general, the property involved in the case at bar is peculiar; it belongs to a class by itself; it is *a railroad right of way.* It is one kind of property which certainly is not benefited, and can not be benefited, by the improvement of a highway running either across it or parallel to it. The question is not as to whether the railroad company which owns this section of a right of way is benefited by the construction or improvement of streets running into or through the city; for all the inhabitants of the city, all persons who do business in the city, the railroad company included, are benefited by anything which benefits the city, and increases its commerce. But while such general benefits justify general taxation, they do not justify special taxation, assessed upon specific pieces of property, selected out of the great bulk of the property in the city. The benefits which justify special assessments, for the purpose of paying for local improvements, must be benefits special or peculiar to *the property which is specially taxed.* Therefore we say that, while the construction or improvement of a highway which runs across or parallel with a portion of a railroad right of

way may benefit the railroad *company*, just as it benefits all other inhabitants of the city, yet it does not benefit that *particular section of the right of way*, which happens to be near the street thus improved.

We are not now considering the question of whether the construction or improvement of the street benefits property upon which the company's *depot* may be situated, or property occupied by its *yards*, but we are considering alone the question of benefit to a mere section of its *right of way*, which is occupied solely by a portion of the roadbed of its main road, and the tracks thereon. And the peculiar nature of this property, and the peculiar use made of it, make it so absolutely plain that no benefit thereto can come from the improvement of an adjacent highway, over which persons travel in carriages or on foot, as to make the proposition indisputable, and one which a court, or the judge thereof, as a man of common knowledge and experience, must know to be true, even in the absence of allegation or proof.

In the case at bar it is alleged, and not denied, that on this narrow right of way, which is only 66 feet wide, the portion thereof involved in this case being nearly 1,800 feet long, there are no houses or buildings of any kind; that there is a double track railroad upon it; and, in the language of the answer, "it is used only, and is available for use only, as an indivisible part of defendant's right of way aforesaid, on which is located a section of its roadbed, as aforesaid, and over which its trains pass between its terminal properties in the two cities aforesaid." (Rec., 16.) And the great weight of modern authority, even before the case of Norwood vs. Baker was decided, was and is to the effect that property of this kind can not be assessed with any part of the cost of improving a street, *because it is one class of property concerning which it is not possible to indulge the presumption that it is benefited by such an improvement.*

One of the strongest cases on this subject is Allegheny City vs. West Pennsylvania Railroad Co., 138 Pa. St. 375. This is a peculiarly strong case, because the general rule in Pennsylvania, as recognized in that case, is, that the owner of an ordinary piece of property can not defend against a local assessment on the idea that his property is not benefited. The opinion in this case is so strong and so directly applicable to the case at bar, and has been so often cited and quoted since, that we feel justified in making quite an extensive quotation from the language of the court. It says:

"The constitutionality of assessments for street improvements can be sustained only upon the ground that the property assessed is benefited by the improvement. This is the doctrine of all the authorities. It is sufficient to refer to Hammett vs. City of Philadelphia, 65 Pa. St. 150.

"It is true, as a general rule, the property owner can not defend that his property is not benefited by the improvement. Michener vs. City of Philadelphia, 118 Pa. St. 535; Commonwealth vs. Woods, 44 Pa. St. 113. These cases, however, and the reasoning by which they are supported, have no application to the roadbed of a railroad company. *This is the one species of property which, it is conceded, can derive no possible benefit from street improvements.* As was said in Philadelphia vs. Railroad Company, *supra* (88 Pa. St. 424), 'a railroad can not, from its very nature, derive any benefit from the paving, while all the rest of the neighborhood *may*.' The owner of an ordinary lot of ground, whether such owner be an individual or a railroad corporation, can not be heard to defend against a municipal assessment for paving, for the reason that the *law presumes* such property is benefited. But, in the case of the roadbed

"of a railroad, the presumption of law is the other way. "It is the same at all times and under all circumstances; "herein *the law declares the absence of benefits.*

"It was urged, however, that the liability of a rail- "road company for municipal assessments was decided by "this court in Western Pennsylvania R. Co. vs. Allegheny, "2 W. N. 229. That case does not rule this, however. "A railroad company may be liable for some municipal "assessments. We have just decided in Mt. Pleasant Bor. "vs. Railroad Co. (138 Pa. St. 365), as has been already "stated, that a passenger depot, freight depot, and lumber "yard were so liable. But neither of the above cases "nor any other case to which my attention has been called "has ever held that such a lien may be filed against the "roadbed. It was urged, however, that it is *within the* "*power* of the legislature to subject it to such claims, "and that the act of 1870 has done so in the city of "Allegheny. We are not discussing the power of that "body to impose *general taxation.* It is admittedly very "great, and as observed in Fox's Appeal, 112 Pa. St. 337, "'within the limits of the Constitution it is bounded only "by the necessities of the State and the will of the peo- "ple.' We are dealing with the case of *special, local* "taxation; of the right of municipal authorities to levy "a tax upon A, which it does not impose upon B, for the "reason that it has done something by which the property "of A has been specially benefited to the amount of the "tax. In the absence of any such benefit, in a case "where we can declare as a matter of law no such bene- "fit can arise, the legislature is powerless to impose such "a burden. It would not be a tax in any proper sense of "the term; it would be in the nature of a forced loan, "and *would practically amount to confiscation.*" (Pages 382 and 383.)

The same conclusion was reached by the Supreme Court of Wisconsin in Chicago, M. & St. P. R. Co. vs. Milwaukee, 89 Wis. 506. Here the court follows the reasoning and cites a number of the decisions of the Supreme Court of Pennsylvania, including the one just quoted from, and, among other things, says:

"It is universally conceded that all such assessments "(special assessments) have their foundation, rest upon, "and can not lawfully exceed, the special benefits of the "improvement to the property against which the cost of "its construction to that extent is charged. (Citing author- "ity.) Such an assessment can not be maintained for "general benefits to the community or locality resulting "from the work. For the payment of such expenditures, "resort must be had to *general* taxation, the rule of which "is required to be uniform. * * * We think it "clear, *as a matter of law*, that property such as the rail- "road tracks and necessary right of way can not be said "to be benefited by the improvement in question. "* * * In Junction R. Co. vs. Philadelphia, 88 "Pa. St. 424, it was held that the city could not maintain "a municipal claim for paving against or opposite the "roadbed of a railroad company, and that it was *imma- "terial whether the company had simply a right of way "or owned the bed in fee.* * * *

"It was contended that the assessment of the Board "of Public Works is conclusive that the entire strip in "question, *including the track and necessary right of way*, "was benefited by grading and paving of Commerce "Street; and that the only question open to the appellant "was as to the amount of benefits. (Citing the cases "relied on.) The question of benefits to the track and

"right of way being a legal one, manifestly the assess-
"ment can not be conclusive, but the position is no doubt
"correct as to the rest of the strip. This precise question
"was presented in Allegheny City vs. West. Pennsylvania
"Railroad Co., 138 Pa. State, 382, where it was held that,"
etc. (Quoting part of the language hereinbefore
quoted in this brief.) Pages 515, 516 and 517.

In Detroit, etc., R. Co. vs. City of Grand Rapids, 106 Mich. 13, which involved a local assessment upon the railroad right of way, the court said:

"The right of way so assessed contains the main track
"and one sidetrack. It has nothing else upon it, and is
"used for no other purpose. It has already been dedi-
"cated to a public use, and the question is presented
"whether a railroad right of way can be assessed by
"municipal corporations for public improvements. So
"far from being any benefit, it is established by the evi-
"dence that the opening and paving of the street were a
"damage to the complainant. *A right of way can not be*
"*benefited by the opening and paving of a street upon it.*
"None of the buildings of the complainant are within
"two blocks of this crossing. We can see no benefits,
"immediate or prospective, to the complainant. The
"division of the right of way into three parcels was
"*arbitrary, as were also the valuations and supposed ben-*
"*efits.* The point is so clearly and concisely stated by
"the Supreme Court of Pennsylvania that we quote the
"opinion in City of Philadelphia vs. Railroad Co., 33 Pa.
"St. 43." (Here quoting.)

In New Jersey R. R. Co. vs. City of Elizabeth, 37 N. J. Law, 330, there were involved two assessments against a railroad right of way, one for improving a street which crossed

it, and the other for improving a sewer near it. The court held that there was no benefit from either improvement, and hence that the assessments could not be upheld. On the subject of the street improvement it said:

"Nor can this assessment be supported on the other "ground of benefits conferred in the advantage derived "in the improvement of the company's lands for the uses "to which they are appropriated. The proof is that the "paving laid on the crossing of the street over the rail- "road track is an injury, rather than a benefit, to the "company, and occasions increased expenses in keeping "the track in repair. The case in this respect is within "the decision of this court in State, the M. & E. R. R. "Co. Pros. vs. Jersey City, 7 Vroom. 56; and the assess- "ments for paving must be set aside." (P. 333.)

Then, as to the sewer assessment, the court said:

"There is nothing in the purpose for which the com- "pany was incorporated, or the use to which the land was "appropriated, that will invalidate the assessment; it "must, therefore, be affirmed, unless its imposition, in "this case, is a violation of the principles laid down in "the Tidewater case (3 C. E. Green 519), that an assess- "ment of an individual owner towards defraying the cost "of a local improvement, must be founded on some pecu- "liar benefit derived by him from its construction over and "above that of the public, and that the amount which he "may lawfully be required to contribute to that end, is "limited to the quantum of benefit he receives." (P. 333.)

Again, in the same volume is reported the case of State vs. Mayor, etc., of Newark (37 N. J. Law, 415), in which the court, through Chief Justice Beasley, said:

"In a government in which the legislative power is not "omnipotent, and in which it is a fundamental axiom "that private property can not be taken without just "compensation, the existence of an *unlimited right* in "the lawmaking power to concentrate the burden of a "tax upon specified property *does not exist.* If the "statute should direct a certain street in a city to be "paved, and the expense of such paving to be assessed "on the houses standing at the four corners of such "street, this would not be an act of taxation, and it is "presumed that no one would assert it to be such. If "this can not be maintained, then it follows that it is "conceded that the legislative power in question is not "*completely arbitrary.* It has its limit; and the only "inquiry is, where that limit is to be placed.

"This question was considered, and, as it was supposed, "was definitely settled by this court in the case of the "Tidewater Co. vs. Coster, reported in 3 C. E. Green 519. "The principle sanctioned by that decision was, that the "cost of a public improvement might be imposed on par-"ticularized property to the extent to which such prop-"erty was exceptionally benefited; and that *any special* "*burthen beyond that measure was illegal.* It was upon "this principle that the case was rested. The rule thus "adopted stands upon the idea that it establishes a stand-"ard by which, with at least an approach to precision, "an act of taxation may be distinguished from an act of "confiscation." (P. 421.)

The opinion of the Supreme Court of Iowa in Chicago, etc., Ry. Co. vs. City of Ottumwa, 112 Iowa, 300, is quite pertinent to the present consideration, though possibly it can not be cited as an absolute adjudication of the question, for

the case was really decided upon a question of construction of the statute, although, as will be seen from the opinion, this construction was induced mainly by the consideration that a *railroad right of way is not benefited* by the paving of a street, and therefore could not be assumed to have been within the legislative intent in providing for local assessment to pay for the cost of such improvement. The court says:

"We may well assume that the legislature, in passing "the acts in question, did not intend that railway rights of "way should be assessed for paving and curbing, for the "reason that such rights, used solely for the laying of "tracks, would not, as a general rule, be benefited in any "manner whatever by the paving or curbing, and if any "argument were needed to enforce this thought, it is to "found in the facts of this case, which show that it was "of no benefit whatever to the right of way. A differ- "ent question arises where the property is used for depot "grounds and other like purposes. On that point we "express no opinion, for it does not arise in the instant "case. (Page 310.) * * *

"Again, it is said that no benefits resulted to the right "of way, or to the corporation owning or occupying the "same, and that for this reason the assessment was *invalid.* "If that were the only question in the case, *we would be* "*inclined to hold with appellant's contention that, as there* "*was no benefit whatsoever, the assessment was, for that* "*reason alone, invalid.* There are, of course, some objec- "tions to this conclusion, and it is best perhaps that we "express no decided conviction on the subject, for it seems "to be held by courts of high authority that the legis- "lature has power to authorize the assessment of railway

"rights of way for local improvements. *In re* County "Commissioner of Hampshire County, 143 Mass. 424. "That question is also left open for further consideration "when it properly arises." (P. 313.)

An examination of the Massachusetts case here referred to by the Supreme Court of Iowa shows that the improvement involved in the Massachusetts case was not a street improvement, but was the improvement of a bank of the Connecticut River near which ran the right of way of the railroad, so that the protection of the bank of the river operated as a protection, and consequent benefit, to the railroad right of way. In fact that does not seem to have been disputed in the case, and there was no question of constitutional power involved in it.

On the question of fact as to whether or not railroad property is benefited by the improvement of a street near it, the Supreme Court of Connecticut seems to have gone to an extreme length in the case of New York, etc., R. Co. vs. City of New Haven, 42 Conn. 279, in which it was held that there is no special benefit even to the *depot property* of a railroad company by the improvement of a street approaching the same. But it is not necessary for the purposes of the present case that the correctness of this conclusion should be determined.

III.

Now, as against this array of authorities, most of which are quite modern, counsel for the defendant in error rely upon two cases, Northern Indiana R. Co. vs. Connelly, 10 Ohio State, 159, and Peru, etc., R. Co. vs. Hanna, 68 Ind. 567.

In the first of these two cases, to wit, Northern Indiana R. Co. vs. Connelly, 10 Ohio State, 159, in dealing with this

question of the right to assess the railroad right of way for the improvement of a street, the court says:

"But it is said that assessments, as distinguished from "general taxation, rest solely upon the idea of equivalents, "a compensation proportioned to the special benefits "derived from the improvement, and that in the case at "bar the railroad company is not, and in the nature of "things can not be, in any degree benefited by the "improvement. It is quite true that the right to impose "such special taxes is based upon a *presumed* equivalent; "but it by no means follows that there must be *in fact* "such full equivalent in every instance, or that its "absence will render the assessment invalid. * * * "*The mode adopted by the council becomes the statutory* "*equivalent for the benefits conferred, although in fact the* "*burthen imposed may greatly preponderate.* In such "case, if no fraud intervene, and the assessment does not "substantially exhaust the owner's interest in the land, "his remedy would seem to be to procure, by a timely "appeal to the city authorities, a reduction of the special "assessment and its imposition, in whole or in part, upon "the public at large." (P. 165.)

As to the last suggestion, that a party's remedy is to appeal to the city authorities to reduce his assessment and impose the burden upon the public at large, this can not apply to an assessment made under the law of Kentucky, for no such appeal would be, or could be, heard under the Kentucky law. The council has no discretion in the matter.

The language of the Supreme Court of Ohio in the case just quoted seems to us to be in effect the language of absolutism. To the citizen who insists that his property can not

be taken without compensation, and that the particular improvement in question is of no benefit to him, and therefore no compensation for the burden imposed, and that there is no reason why his property should be singled out from the mass of property in the city and required to pay the cost of this public improvement, and that the Constitution gives him a right to an equivalent for his property taken, the court says: "Yes, you are right about this; you are entitled to compensation; the legislature can not take your property, even for public use, without an equivalent to you; the Constitution so provides; *BUT* that is a mere *fiction* of the law; although *in fact* you received no equivalent, yet the law conclusively *presumes* you have received it, because the legislature and council have ordered your property to be taken; and '*the mode adopted by the council becomes the statutory equivalent for the benefits conferred.*'" This process of reasoning seems to us to make the claim of constitutional limitation upon the power of the legislature, and of constitutional protection to the rights of private property, a subject of ridicule. The most absolute despot that ever lived might, with equal force and truth, boast that his is a constitutional monarchy, while saying to a subject: "I want your house and lands; you are entitled to be paid for them; an order has been issued that you deliver them to me; that order is the 'equivalent' for your property. You are *presumed* to have been compensated."

In the other case relied on, to wit, Peru, etc., R. Co. vs. Hanna, 68 Ind. 567, the court, without attempting to reason upon the subject, disposes of it in the following two short sentences, to wit:

"The first point made by appellant's counsel is that the "strip of ground in controversy is not assessable for street "improvement, because the railroad track is itself a public

"highway. We can not concur in this view, but are of "opinion that the track of a railroad company, when it "borders on a street, is properly assessable for its due pro- "portion of the cost of the improvement of such street "under an ordinance of the city. City of Chicago vs. "Baer, 41 Ill. 306; Northern Indiana R. R. Co. vs. Con- "nelly, 10 Ohio St. 159; Burlington, etc., R. Co. vs. "Spearman, 12 Iowa, 112." (P. 567.)

Now, of the three authorities thus cited by the Supreme Court of Indiana in support of this proposition, two of them, to wit, the cases in 41 Illinois and 12 Iowa, have absolutely no application to the question under consideration, because in each of them it was conceded that the property in question *was benefited* by the improvement made. In the Iowa case the property was a railroad *depot*; and while the Supreme Court of Iowa held that this was assessable, we know from the authority heretofore cited that, as to a railroad *right of way*, the Supreme Court of Iowa holds that it is not benefited by a street improvement, and is not assessable. (Chicago, etc., R. Co. vs. City of Ottumwa, 112 Iowa, 300, 309.) And in the Illinois case, City of Chicago vs. Baer, 41 Ill. 306, the property involved was a street railway, in the street improved, and the court in its opinion expressly says that no one denies that the property is in fact benefited, that the fact of actual benefit to the property is something which *no one would controvert.* The only other authority cited by the Indiana court for its very brief statement on the subject is the case, just considered, of Northern Indiana R. Co. vs. Connelly, 10 Ohio St. 159.

We find that a decision by this court, to wit, Illinois Central Railroad Co. vs. City of Decatur, 147 U. S. 190, is sometimes cited as a decision to the effect that a railroad right of

way is benefited by the improvement of a street, and that to assess the right of way with that part of the cost of such improvement does not deprive the company of its property without due process of law. As a matter of fact, however, no such question was involved in that case. The case was one which arose in a State court in Illinois and came to this court by writ of error to the Supreme Court of Illinois. Of course, it came here only on *a federal question*, and only upon such federal question as was *raised by the record*. And the only federal question raised by the record was a question of *contract*. The railroad company in its charter had a provision to the effect that, upon the payment of certain taxes, it should be exempt from *all other taxation*; and it was insisted that this exemption covered *special assessments* for local improvements, as being a form of taxation; and therefore, that the attempt to tax the property of the railroad company for a street improvement was a *violation of the charter contract*. The railroad company did not make the question that to tax the property for a local improvement, when there was no local benefit, was a deprivation of property *without due process of law*. That the question in the case was the one we have stated, to wit, the question of contract, and not a question of due process of law, is shown by the opening sentence in Mr. Justice Brewer's opinion, which is as follows, to wit:

> "*The single question in this case is*, whether this special "tax for the local improvement *is within the exemption* "*from taxation granted to the railroad company by Sec-* "*tion 22 of the act of 1851*." (P. 197.)

The court then proceeds to examine into the question of the nature of general taxation and special taxation, and to show that, while a special tax is, in its proper sense, *a tax*,

yet it was manifestly not the character of tax that was referred to by the terms used in the charter contract, and therefore, that there was no violation of that contract. And when the court, in the last paragraph of its opinion (p. 208), uses language to the effect that the company did not, by its charter, have any contract as to whether the question of local benefits should be determined by a *jury* or by a *council*, it was still considering the question of the *construction of that charter contract*, and was referring to the fact, which is a fact in Illinois judicial history (as shown by the opinion of the court in White vs. the People, 94 Ill. 504), that there had grown up in the State of Illinois two different procedures for paying the cost of local improvements, to wit, one called generally a "special tax," and the other a "special assessment," in one of which *the council* passed on the question of benefits, and in the other of which *a jury* passed on the question. And all the court meant by the language of the last paragraph of the opinion is that the railroad company had no *contract* with the State of Illinois as to how the question of special benefits should be determined. The question involved in the case at bar as to the power to impose a special tax upon property for a local improvement, based on the pretense of local benefit, when there had, in fact, been no local benefit, was not involved in that case, as the opening sentence of the opinion above quoted shows.

The court may find a number of *Street Railway* cases cited, in which it has been held that a street railway, *lying in the street improved*, may be assessed for an improvement of the street. But it is manifest that an improvement of the street in which the street railway lies is a benefit to the street railway; and in the cases upon that subject this consideration is brought forth. Thus City of New Haven vs. Fair Haven R. Co., 38 Conn. 422, is sometimes cited; but

that was a case of a *street railway*, and the court said, as a matter of fact, that the defendant was *unquestionably benefited* by the improvement. Again, the case of the Appeal of North Beach R'y Co., 32 Cal. 499, is sometimes cited. This also was a street railway; and the court held as a *conclusion of fact* that there could be no doubt that the property of the street railway company was benefited by the widening and improvement of the street involved. On that subject it said: "The more people traveling and frequenting Kearney Street, the greater the number likely to ride in the company's cars, and the greater its profits are likely to be." (32 Cal. 514.) Manifestly, these street railway cases have no bearing whatever upon the question involved in the case at bar.

It seems to us it must be evident to any thinking person, and would be evident in the absence of allegation or proof, that a *mere section of the right of way of a railroad*, whether the title be technically an easement or a fee, upon which are only the roadbed and the tracks of the company, is *not benefited to the slightest degree by the opening or the paving of a street, crossing the same or running parallel with it;* but that, on the contrary, as alleged in the answer in the case at bar, the improvement of such a street, or anything which induces additional passage over it, running across the railroad or immediately adjacent to it, is an injury rather than a benefit. And it seems to us to be simply a mockery to say that, while this is true, yet the court will *presume the contrary to be true*, in order to meet the constitutional requirement that the property of the citizen shall not be taken, even for a public purpose, without just compensation. And we do not believe that this court has ever retracted, and we certainly hope that it never will retract, the proposition so strongly and clearly stated in Norwood vs. Baker that "the exaction from the owner of private property of the cost

of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation."

IV

After the enunciation by this court of the principle involved in Norwood vs. Baker, it was received by the Supreme Courts of many of the States with, we might almost say, enthusiastic approval, as being manifestly and eminently just.

In Sears vs. Board of Aldermen of Boston, 173 Mass. 71, the Supreme Court of Massachusetts said:

> "It is now established by the highest judicial authority "that such assessments (special assessments) can not be "so laid upon any estate as to be in substantial excess of "the benefit received. The case of Norwood vs. Baker, "172 U. S. 269, contains an elaborate discussion of the "subject, with a citation of authorities from many of the "States, and holds that a local assessment for an amount "in substantial excess of the benefit received is in violation "of the Fourteenth Amendment of the Constitution of "the United States, inasmuch as it would deprive one of "his property without compensation, and so without due "process of law. The authority of this case is controlling "in all State courts, and *if it were not*, it is *in accordance* "*with sound principle*, and with the great weight of author- "ity in other courts." (P. 78.)

In Hutchison vs. Storrie, 92 Texas, 685, the Supreme Court of Texas, after stating the principle decided in Norwood vs. Baker, says:

"We recognize the binding force of the decisions of "the Supreme Court of the United States upon this ques- "tion, but *we the more readily apply it, because we endorse* "*it as a timely and just announcement of the superiority* "*of a constitutional guaranty over a rule of law established* "*by the courts.*" (P. 691.)

The Supreme Court of Ohio in Schroder vs. Overman, 61 Ohio St. 1, 47 L. R. A. 156, fully recognized the effect and the justice of the principle settled by Norwood vs. Baker, but pointed out that in that case the court had determined, upon the trial, that the benefit in fact exceeded the amount of the assessment; and in that connection said:

"Undoubtedly, as has been held by this court again and "again, the principle which permits the assessments of "the cost of local improvements upon abutting and con- "tiguous lands, is, that such property receives benefits "beyond that common to the public at large, and the *con-* "*clusion would naturally follow*, and does follow, that *such* "*assessment can in no case, save by express consent of the* "*owner, lawfully exceed such benefit.* It follows, further, "that any system which results in imposing such assess- "ments without respect to benefits must be vicious and "unsound. But we are dealing with a case where the "court has determined, upon a trial, that the benefit *in* "*fact* exceeds the amount of the assessment, and yet where "the plaintiff asks the interposition of a court of equity to "prevent the commission of an alleged wrong upon her "property." (P. 13.)

In Kersten vs. City of Milwaukee, 106 Wis. 200; 48 L. R. A. 851, a board of public works claimed to have viewed the premises, and to have based an assessment upon their

judgment of cost and benefit; but the court disregarded the same upon the proof in the case to the effect that the conclusion of the board was *palpably not justified by the facts*, and on that subject the court said:

> "It is not enough for the board to say that they viewed "the premises, and exercised their judgment, if the facts "negative that assertion. Here *the facts cry out so loudly* "*against the conclusion reached that we find no difficulty* "*in agreeing with the court's estimate of the board's pro-* "*cedure.*" (P. 204.)

Accordingly the court held that all proceedings should be stayed until there should be a reassessment of damages and benefits.

We think we may appropriately conclude our reference to authorities by a quotation of the language of Judge Dillon in his work on municipal corporations, in which, in speaking of this subject and the conflict in authority, he says:

> "Whether it is competent for the legislature to declare "that no part of the expense of a local improvement of a "public nature shall be borne by a general tax, and that "the whole of it shall be assessed upon the abutting prop- "erty and other property in the vicinity of the improve- "ments, thus for itself conclusively determining, not only "that such property is specially benefited, but that it is "thus benefited to the extent of the cost of the improve- "ment, and then to provide for the apportionment of the "amount by an estimate to be made by designated boards "or officers, or by frontage or superficial area, is a question "upon which the courts are not agreed. Almost all of "the earlier cases asserted that the legislative discretion "in the apportionment of public burdens extended thus

"far, and such legislation is still upheld in most of the "States. But since the period when express provisions "have been made in many of the State Constitutions "requiring uniformity and equality of taxation, several "courts of great respectability, either by force of this "requirement or in the spirit of it, and perceiving that "special benefits actually received by each parcel of con- "tributing property *was the only principle upon which such* "*assessments can justly rest*, and that any other rule is "unequal, oppressive and arbitrary, have denied the "unlimited scope of legislative discretion and power, and "asserted *what must, upon principle, be regarded as the* "*just and reasonable doctrine, that the cost of a local* "*improvement can be assessed upon particular property* "*only to the extent that it is specially and peculiarly bene-* "*fited; and, since the excess beyond that is a benefit to the* "*municipality at large, it must be borne by the general* "*treasury.*" (2 Dillon on Municipal Corporation, 4th edition, page 935, Section 761.)

It seems to us that the edict of the legislature, to the effect that the cost of improving a public street shall be assessed solely upon the property, and all the property, lying between that street and a parallel line drawn halfway between it and the next parallel street, regardless of the nature of the property lying within such territory, although the only constitutional warrant for such special taxation of property is special benefit thereto, and the question of whether or not the owner can have any relief in the courts of the land against this legislative edict, if it oversteps the bounds of the Constitution, recalls that question which was so earnestly debated in the early history of this Republic, to wit, as to whether or not there is any power in the judici-

ary to declare that an act of the legislature is void because contrary to the Constitution, and concerning which this court, speaking through Chief Justice Marshall in Marbury vs. Madison, 1 Cranch, 176, used the following language, which has ever since been accepted as decisive, to wit:

"The question, whether an act repugnant to the Con-
"stitution can become the law of the land, is a question
"deeply interesting to the United States; but, happily,
"not of an intricacy proportioned to its interest. It
"seems only necessary to recognize certain principles,
"supposed to have been long and well established, to
"decide it.

"That the people have an original right to establish,
"for their future government, such principles as, in their
"opinion, shall most conduce to their own happiness, is
"the basis on which the whole American fabric has been
"erected. The exercise of this original right is a very
"great exertion; nor can it, nor ought it, to be frequently
"repeated. The principles, therefore, so established, are
"deemed fundamental. And as the authority from which
"they proceed is supreme, and can seldom act, they are
"designed to be permanent.

"This original and supreme will organizes the govern-
"ment, and assigns to different departments their respect-
"ive powers. It may either stop here, or establish *certain*
"*limits not to be transcended by those departments.*

"The government of the United States is of the latter
"description. The powers of the legislature are defined
"and limited; and that those limits may not be mistaken,
"or forgotten, the Constitution is written. *To what pur-*
"*pose are powers limited, and to what purpose is that lim-*
"*itation committed to writing, if these limits may, at any*

"*time, be passed by those intended to be restrained?* The "distinction between a government with limited and "unlimited powers is abolished, if those limits do not con- "fine the persons on whom they are imposed, and if acts "prohibited and acts allowed are of equal obligation. It "is a proposition too plain to be contested that the Con- "stitution controls any legislative act repugnant to it; "or, that the legislature may alter the Constitution by an "ordinary act.

"Between these alternatives there is no middle ground. "The Constitution is either a superior paramount law, "unchangeable by ordinary means, or it is on a level "with ordinary legislative acts, and, like other acts, is "alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a "legislative act contrary to the Constitution, is not law; "if the latter part be true, then written Constitutions are "absurd attempts, on the part of the people, to limit a "power in its own nature illimitable.

"Certainly all those who have framed written Constitu- "tions contemplate them as forming the fundamental and "paramount law of the nation, and, consequently, the "theory of every such government must be, that an act of "the legislature, repugnant to the Constitution, is void.

"This theory is essentially attached to a written Con- "stitution, and is consequently to be considered, by this "court, as one of the fundamental principles of our society. "It is not, therefore, to be lost sight of in the further con- "sideration of this subject."

Of what possible benefit is it to the citizen that the Constitution provides that he shall not be deprived of his property without due process of law, that his property shall not

be taken from him, even for a public purpose, without just compensation, if the legislature has nevertheless the absolute power to say that his property shall be taken from him, even though he has received no compensation? Yet that power is what is contended for, and must be upheld, if the judgment in this case is affirmed.

In response to this, it may be claimed that the legislature *has determined*, as a matter of fact, that the right of way of the Louisville & Nashville Railroad Company adjacent to Frankfort Avenue *has been benefited* to the extent of the amount of this assessment, to wit, $3,176.72. *But that is not true;* and this court knows, on the face of this record and on the face of the statutes and ordinances involved, that it is not true. *There has been no such determination by the legislature or any other tribunal.* There has been no consideration of that question by any tribunal whatever. The legislative act involved, to wit, Section 2833 of the Kentucky Statutes (quoted as an appendix to the brief of defendant in error) is simply a GENERAL RULE, APPLICABLE TO ALL CASES, *without reference to the particular facts of any situation, or to the peculiar character, or nature, or value of any particular property.* It is simply an immutable rule that, in case of the improvement of a public street, the cost thereof shall be borne by the property on each side, extending back halfway to the next parallel street, if the territory be bounded by streets; and that, if it be not bounded by streets, the cost of the improvement shall be borne by the territory on each side thereof, extending back for such a distance as the council in the particular case may prescribe; but that, even in the latter case, while the council may fix the outer boundary lines of the district (where it is not bounded by streets), yet, when these outer boundaries are once fixed, then all property within those boundaries, without regard to character, condition or

value, shall pay the same rate for each square foot embraced therein. Now, this is not an adjudication, or a determination, either by the legislature or by the council, that in the particular case of the improvement of Frankfort Avenue all of the property between Frankfort Avenue and a line drawn halfway between it and the next parallel street is in fact benefited by this improvement to the extent of the cost of the improvement. It is not a determination by any tribunal that the section of the right of way of the Louisville & Nashville Railroad Company, which happens to lie within that territory, is benefited to the extent of the cost apportioned against it, to wit, $3,176.72. The apportionment of that cost against this particular property, is simply the result of the application of a general, ironbound rule, which the legislature, several years ago, before this improvement was ever undertaken, declared should be applied *to all cases* of the improvement of streets, *without regard to the individual facts of any case.* It is *a law, a rule*, as distinguished from *a decision.* And while it is true that the act contains the provision heretofore mentioned, to the effect that the court in which any suit may be pending "shall make all corrections, rules and orders to do justice to all parties concerned," yet the courts of Kentucky have construed that as not permitting any individual whose property is thus assessed to show that the cost assessed against his property is in substantial excess of the benefit accruing thereto, unless he can show, that the cost assessed against his property is absolutely *equal to the value of the property*, so as to "*entirely* take from the citizen his property." In other words, the courts of Kentucky have construed this to mean that the citizen can have no relief from the operation of this rule (enacted without regard to the facts of any individual case), if he is thus arbitrarily deprived of *half* the value of his property, or *three-fourths* of the value

of his property; and that the court will not interfere, unless the *whole of his property* is taken away from him. Under the Constitution the State is as powerless to deprive the citizen of half of his property without compensation as it is to deprive him of the whole of it without compensation. And yet under this statute, as construed by the courts of Kentucky, and as applied in the case at bar, the defendant is deprived, under the simple operation of a legislative edict, without any regard to the facts of the case, of property to the value of $3,176.72, certainly a "substantial" sum, without any compensation whatever, thus absolutely overriding the limitations of the Constitution. And in conclusion we may ask, in the language of Chief Justice Marshall:

> "To what purpose are powers limited, and to what "purpose is that limitation committed to writing, if these "limits may, at any time be passed by those intended to "be restrained?"

We respectfully ask that he motion to dismiss or affirm be overruled.

Respectfully submitted,

HELM BRUCE,
Attorney for Plaintiff in Error.

JAMES P. HELM,
Of Counsel.

Nov. 11th, 1904.

Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - *Plaintiff in Error,*

vs.

BARBER ASPHALT PAVING COMPANY AND THE CITY OF LOUISVILLE, - *Defendants in Error.*

Brief for Plaintiff in Error on Motion to Dismiss or Affirm.

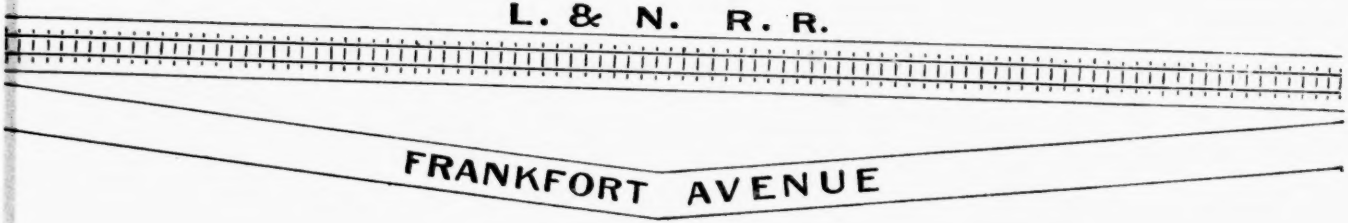
The railroad of the Louisville & Nashville Railroad Company through the extreme eastern portion of the city of Louisville lies, for a long distance, side by side with a street called Frankfort Avenue. This was formerly an old turnpike leading from the city of Louisville to Shelbyville and Frankfort and other points east. On account of the growth of the city its boundaries were extended, thus taking in a large amount of land from Jefferson County, and bringing within the limits a long section of the old turnpike. This was then improved as a city street by laying upon it an expensive asphalt pavement. The entire cost of this improvement was apportioned upon the immediately adjacent property on the local assessment plan. This suit embraces one section of the improvement thus made, this section being about one-third of a mile in length. The railroad, as said

above, lies practically side by side with the highway in question. At the extreme east and west ends of the section involved in this suit the railroad and the highway are adjacent to each other; but between the two ends the highway deflects somewhat to the southward, so that, near the halfway point, it is about 100 feet from the line of the railroad. In other words, the situation is as shown on the accompanying diagram, it being remembered that the railroad is a double track railroad.

The city of Louisville assessed upon the section of the railroad right of way here involved the sum of $3,472.94 as its part of the cost of making this improvement of the street. The railroad company declined to pay it, for the reasons stated in its answer, which we shall presently quote. The contractor, to wit, the Barber Asphalt Paving Company, to which had been issued the city's warrant against the right of way, brought suit in the Jefferson Circuit Court, asserting a lien upon the right of way for $3,472.94, with interest, and asked for a sale to satisfy the same. The defendant answered, and as that answer is not unduly long, and states the facts upon which the decision of the case rests, we here quote it in full:

"Defendant, the Louisville & Nashville Railroad Com-
"pany, denies that it is, or at the institution of this action
"was, the owner of a lot of land described in the petition
"as belonging to it, or to any part thereof, except in
"the manner and to the extent hereinafter set forth.

"Par. 2. Said defendant says it is a corporation
"created for the purpose of owning and operating a rail-
"road under and by an act of the General Assembly of
"Kentucky, entitled 'An Act to charter the Louisville &
"Nashville Railroad Company,' approved March 5, 1850,
"and various acts amendatory thereof.


L. & N. R. R.
FRANKFORT AVENUE

"It says it does now own and for many years has owned "a line of railroad extending from Newport, Ky., to and "through Louisville, Ky., and thence southwardly through "Kentucky and other States.

"It owns, and has long owned, a perpetual right of way "for railroad purposes from Newport to and into Louis- "ville, over a long strip of land, which is about 110 miles "long and about 66 feet wide, on which is constructed its "roadbed, and over which are operated its trains between "and into the cities aforesaid. Occasionally, for short "distances, the width of the right of way as above given "varies, but that given above is the usual width, and is "its greatest width at the place referred to in the petition "herein. The said right of way passes over the parcel of "land described in the petition herein as belonging to this "defendant; in other words, it constitutes a section of "said indivisible and continuous right of way between the "cities aforesaid; and the only interest of defendant in "said land is an easement therein, to wit, the perpetual "right of itself, its successors and assigns, to the use of "the same for railroad purposes, as aforesaid; and should "such use be abandoned, all interest of this defendant, its "successors and assigns, in said land would cease. Over "said parcel of land, which, as aforesaid, is, at its greatest "width, only 66 feet wide, is constructed a section of "defendant's roadbed between its terminal properties in the "cities aforesaid, and on the same are laid two tracks, par- "allel with the northerly and southerly lines of said par- "cel of land described in the petition, constituting what "is called a double track, and being parts of defendant's "two main tracks between the cities aforesaid, over which "are operated its trains between said cities. *On said par-* "*cel of land there are no houses or buildings, but it is used*

"*only, and is available for use only, as an indivisible part* "*of defendant's right of way aforesaid, on which is located* "*a section of its roadbed as aforesaid, and over which its* "*trains pass between its terminal properties in the two* "*cities aforesaid.*

"Said parcel of land over which said right of way "exists, as aforesaid, runs practically parallel with the sec- "tion of the street described in the petition herein as hav- "ing been improved. The south line of said parcel of land, "over which the said right of way exists, and the north "line of the said street are very close together, possibly in "contact with each other, at the extreme eastern and "western ends thereof, and, while the south line of the said "right of way is a straight line, the north line of the "street is a curved line, the concave side thereof being "toward the line of said right of way; the greatest "distance between said two lines being about 105 feet, "which is at a point about halfway between the eastern "and western ends of the property and street described in "the petition.

"*Defendant says neither said parcel of land described* "*in the petition, nor any right or interest of defendant* "*therein, is, or has been, or will be, or can be, benefited to the* "*slightest degree by the improvement of Frankfort Avenue* "*as set forth in the petition herein. On the contrary, the* "*existence of said avenue and the improvement thereof,* "*which will lead probably to an increase in the use thereof,* "*being very close to the said right of way of defendant,* "*is a positive injury to defendant and its said right of* "*way, rather than a benefit.* Said right of way could be "more safely and advantageously used by defendant for "the only purpose for which it does or can ever use it, if "said Frankfort Avenue were entirely removed from

"within the territory described in plaintiff's petition as a "tax district, than it can with said avenue in said district.

"Defendant says that to subject said parcel of land "described in the petition, or defendant's interest therein, "under the ordinance referred to in the petition, to the "payment of any part of the cost of the improvement of "Frankfort Avenue, or to compel this defendant in any "way to pay any part of the cost of improving said "Frankfort Avenue, otherwise than by means of a general "tax laid equally and uniformly upon all taxable property "in the city of Louisville, *will be to deprive this defendant "of its property without due process of law, and would "deny to it the equal protection of the laws, contrary to "the provisions of the Fourteenth Amendment to the "Constitution of the United States.*

"Wherefore, defendant prays that plaintiff's petition "be dismissed." (Rec., 16.)

In other words, the defendant in effect pleaded, as a matter of fact, that the exaction here sought to be made from it for the cost of this public improvement was "in substantial excess of the special benefits accruing to it"; that the cost assessed against it was $3,472.94, whereas there was no special benefit whatever accruing to its property sought to be charged, and that this was, therefore, "a taking, under the guise of taxation, of private property for public use without compensation."

To this answer the plaintiff demurred; that demurrer was sustained; and after making a correction in the assessment, whereby it was reduced by the sum of $296.22, the court entered a judgment giving plaintiff a lien upon this section of the right of way for sums aggregating $3,176.72, and ordered a sale to satisfy the same. (Rec., 50.) From that

judgment an appeal was taken to the Court of Appeals of Kentucky, where it was affirmed; and the case was then brought to this court by writ of error. Defendants in error have now moved to dismiss or affirm.

MOTION TO DISMISS.

We are not advised of the ground upon which the motion to dismiss is made. Not a word is said about it in the brief filed by defendants in error. The answer makes the federal question as plain as the English language can make it; and the motion to dismiss was evidently made merely in order to afford an opportunity for making a motion to affirm; which seems to us to be a manifest abuse of the rule of this court governing such cases.

MOTION TO AFFIRM.

Subsection 5 of Rule 6 of this court says:

> "There may be united with a motion to dismiss a writ "of error or an appeal, a motion to affirm on the ground "that, although the record may show that this court has "jurisdiction, it is manifest the writ or appeal was *taken* "*for delay only*, or that the question on which the juris- "diction depends is *so frivolous as not to need further* "*argument*."

There is certainly nothing in this record to show that this writ was taken for delay only, and we do not see how it can be said under the state of the decisions to which we shall refer, that the federal question involved is "so frivolous as not to need further argument."

I.

Of course, we are familiar with the opinions of this court, first in Norwood vs. Baker, 172 U. S. 269, and then in French vs. Barber Asphalt Paving Company, 181 U. S. 324, and other cases decided on the same day.

The court in the latter cases did not overrule Norwood vs. Baker, nor retract the fundamental principle therein asserted. We do not rely alone upon our own interpretation of the opinions in question. In the case of White vs. City of Tacoma, 109 Fed. Rep. 32, the court said:

"In a series of decisions recently rendered the Supreme "Court of the United States has corrected a common "understanding of the decision of that court in the case "of Village of Norwood vs. Baker, 172 U. S. 269. (Citing "the cases referred to.) In these several decisions the "Supreme Court recognizes the fact that the per front "foot plan *may be* a perfectly fair method of apportioning "the burden of paying for street improvements, and that "in cases in which it appears that assessments levied "according to that plan are not in excess of the benefits "to the property assessed, and are equal and fair, *so that "there is no ground for complaining of actual injustice*, "the assessments are not *necessarily* in violation of the "Constitution of the United States *merely because made "according to the per front foot plan;* and it is shown "that no such inflexible rule was announced or intended "by the court in its decision in the case of Village of "Norwood vs. Baker. That decision, however, does "emphatically declare these important principles: That "State laws providing for assessing the cost of street "improvements upon abutting property, which *in prac-*